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Equitable Mootness in Bankruptcy Appeals

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EQUITABLE MOOTNESS IN BANKRUPTCY APPEALS

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I. INTRODUCTION

The right of a litigant to have the litigant's case heard by a fair and impartial judge, isolated from political and social pressures, lies at the heart of American law. Article III of the United States Constitution establishes the federal judiciary as a distinct and independent branch of government.[1] The independence of the judiciary serves the dual purpose of safeguarding a litigant's right to have claims heard by a judge free from potential domination, and maintaining separation of powers among the three branches of government.[2] While the prototypical judge is granted power to adjudicate disputes by Article III of the U.S. Constitution, a bankruptcy judge is granted that power by Congress, pursuant to Article I.[3]

The jurisdiction of bankruptcy courts is constrained by Article III.[4] In response to Congress's enactment of the

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1. U.S. CONST. art. III, § 1.

2. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986).

3. U.S. CONST. art. I, § 8, cl. 4. Courts granted power by Congress are commonly referred to as Article I courts, while those granted power under Article III of the Constitution are referred to as Article III courts. The main distinction between the two is that Article III courts are truly independent and serve to check the other branches, whereas Article I courts can theoretically be shut down by Congress at any time. The differences between the two courts are discussed later on in the comment. *See, e.g.*, discussion *infra* Part II.

4. *See* U.S. CONST. art. III.

Bankruptcy Reform Act of 1978 (the "1978 Act"),[5] which significantly expanded the jurisdiction of bankruptcy judges, the United States Supreme Court ruled that Article III requires the "essential attributes of judicial power" to be exercised exclusively by the judicial branch.[6] This has been interpreted to mean that an Article III court has the "appearance and reality of control . . . over interpretation, declaration, and application of federal law."[7] Subsequent bankruptcy legislation attempted to remedy the 1978 Act's constitutional shortcomings[8] by designating bankruptcy courts as "units" of the district courts,[9] giving district courts the option of referring cases to the bankruptcy units,[10] and giving litigants a right to appeal bankruptcy judges' decisions to an Article III court.[11] These safeguards help to maintain the independent judiciary. However, the doctrine of equitable mootness as recently applied allows bankruptcy courts to effectively exercise judicial power, threatening litigants' right to review by an independent Article III court.

The doctrine of equitable mootness causes two related problems. First, it allows district courts to avoid their obligation to exercise jurisdiction granted to them by Congress. Second, it allows the bankruptcy court to effectively dismiss an appeal without review on the merits by a judicial court, thereby depriving litigants of their constitutionally guaranteed right to be heard by an independent adjudicator.[12] Under this doctrine, a district court will decline to hear an appeal on the merits, despite having the power to grant effective relief, if events or transactions have taken place, pending appeal, which make it "inequitable" to grant relief.[13] Because the factors considered

5. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. § 101 (2000)).

6. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982) (plurality opinion).

7. Noriega-Perez v. United States, 179 F.3d 1166, 1176 (9th Cir. 1999) (quoting Pacemaker Diagnostic Clinic, Inc. v. Instromedix, 725 F.2d 537, 544 (9th Cir. 1984)).

8. *See N. Pipeline Constr. Co.*, 458 U.S. at 78–87 (discussing why the 1978 Act was unconstitutional).

9. 28 U.S.C. § 151 (2000).

10. 28 U.S.C. § 157(a) (2000).

11. 11 U.S.C. § 305 (2000).

12. *See* discussion *infra* Part IV.F.

13. *In re* Cont'l Airlines, 91 F.3d 553, 558–59 (3d Cir. 1996).

when determining whether an appeal is equitably moot are effectively within the control of the bankruptcy court,[14] an Article I judge can determine whether a litigant is able to obtain review by an Article III judge. This undermines the protections afforded by separation of powers in government, tending to do the most harm to litigants with meritorious appeals.

This comment examines the doctrine of equitable mootness and its effect on a litigant's ability to obtain review by an Article III court. Part II of this comment provides a brief overview of the constitutional issues arising from bankruptcy legislation, a brief overview of the bankruptcy process, and an introduction to the doctrine of equitable mootness.[15] Part III identifies the problems presented by equitable mootness, which allows district courts to avoid their obligations and allows bankruptcy courts to effectively decide when an appeal will be heard, both of which deprive litigants of their right to review by an Article III court.[16] Part IV discusses the doctrine of equitable mootness as applied in the case of *In re Continental Airlines*.[17] It goes on to examine the legitimacy of equitable mootness, the district courts' obligation to exercise the jurisdiction granted to them by statute, the mechanism by which bankruptcy courts deprive litigants of review by an Article III court, the constitutional issue raised by broad application of the doctrine, and briefly, how a sophisticated party might take advantage of the doctrine.[18] Finally, Part V proposes two procedural rules that would prevent the occurrence of events or transactions that cause an appeal to be dismissed on mootness grounds.[19]

II. BACKGROUND

Article I of the United States Constitution expressly grants Congress the power "to establish . . . uniform laws on the subject of Bankruptcies throughout the United States."[20] Congress passed the first federal bankruptcy act pursuant to

14. *See infra* Part IV.C.
15. *See infra* Part II.
16. *See infra* Part III.
17. *In re* Cont'l Airlines, 91 F.3d 553; *see infra* Part IV.A.
18. *See infra* Part IV.B–G.
19. *See infra* Part V.
20. U.S. CONST. art. I, § 8, cl. 4.

this power in 1800, but repealed the act after only three years.[21] Throughout the nineteenth century, Congress made several additional attempts to pass workable bankruptcy laws,[22] but repealed each new law shortly after it came into effect.[23] In 1898, Congress passed the longest running bankruptcy law in U.S. history.[24] The Bankruptcy Act of 1898 (the "1898 Act") was effective for eighty years before being supplanted by the Bankruptcy Reform Act of 1978.[25]

A. Jurisdictional Issues of the Bankruptcy Acts

Since the inception of the 1898 Act, bankruptcy courts have had limited jurisdiction.[26] In 1968, sentiment had grown that bankruptcy law in the United States was in need of reform.[27] Congress created a review commission to study, evaluate, and recommend changes to the 1898 Act.[28] After a decade of study and debate, Congress passed the Bankruptcy Reform Act of 1978 (the "1978 Act").[29]

One major point of debate leading up to the bankruptcy bill's passage concerned the limited jurisdiction of bankruptcy courts.[30] The 1978 Act sought to remedy, among other things, these perceived jurisdictional limitations.[31] In comparison to

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21. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 14 (1995).

22. *Id.* at 16–23.

23. After the first bankruptcy act was repealed in 1803, Congress passed the Act of 1841, which was repealed two years later, followed by the Act of 1867, which was amended in 1874 and repealed in 1878. *Id.* at 16–22.

24. *See id.* at 14–23.

25. *Id.* at 23.

26. *See In re* J.M. Wells, Inc., 575 F.2d 329, 331 (1st Cir. 1978).

27. Tabb, *supra* note 21, at 32.

28. *Id.* at 33.

29. *Id.* at 34.

30. *Id.*

31. A major weakness of the 1898 Act was its splintered jurisdictional scheme, in which bankruptcy judges could only hear certain core matters. *Id.* Congress obviously believed that it could vest bankruptcy courts with additional power to solve the problem. The Supreme Court has recognized that:

> [W]hen Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated—including the assignment to an adjunct of some functions historically performed by judges. . . . [T]he functions of the adjunct must be limited in such a way that "the essential attributes" of judicial power are retained in the Article III courts.

N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 80–81 (1982) (plurality opinion).

the 1898 Act, the 1978 Act granted expansive and unprecedented additional powers to bankruptcy judges. The Act expanded the bankruptcy courts' jurisdiction to allow bankruptcy judges to rule on "virtually any matter arising in, or related to the bankruptcy case."[32] The Act's substantial structural changes to the bankruptcy judiciary led to a prompt constitutional challenge.

In the 1982 *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* decision,[33] the Supreme Court ruled that the 1978 Act unconstitutionally allowed bankruptcy judges to exercise powers reserved to the judicial branch by Article III of the United States Constitution.[34] Article III of the U.S. Constitution serves to safeguard a litigant's "right to have claims decided by judges who are free from potential domination by other branches of government."[35] As interpreted by the Supreme Court, Article III allows legislative courts to make some factual determinations.[36] But to pass constitutional muster, the functions of the legislative court must be limited such that the essential attributes of judicial power remain vested in an Article III court.[37] The Court in *Northern Pipeline Construction Co.* found that Article III barred Congress from passing the 1978 Act, because the broad grant of jurisdiction impermissibly vested the essential attributes of judicial power in a non-Article III court.[38] An Article III court must retain the essential attributes of judicial power to protect litigants' constitutional rights and the structure of government in the United States.[39]

Realizing the far-reaching implications of its decision—which would have effectively stalled the processing of all bankruptcy cases in the United States until Congress remedied the 1978 Act—the Supreme Court voluntarily

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32. Tabb, *supra* note 21, at 34; *see also N. Pipeline Constr. Co.*, 458 U.S. at 56 (a company filed suit in bankruptcy court for breach of contract, warranty, misrepresentation, coercion, and duress shortly after a reorganization).

33. *N. Pipeline Constr. Co.*, 458 U.S. 50 (1982).

34. *Id.* at 87.

35. United States v. Will, 449 U.S. 200, 218 (1980); *See also N. Pipeline Constr. Co.*, 458 U.S. at 77 ("[T]he power to adjudicate 'private rights' must be vested in an Art. III court . . . .").

36. *N. Pipeline Constr. Co.*, 458 U.S. at 81.

37. *Id.*

38. *Id.* at 87.

39. *See* discussion *infra* Part II.A.

stayed its own decision for a period of five months in order to allow Congress to pass a new bankruptcy bill.[40] In 1984, more than two years after the *Northern Pipeline Construction Co.* decision, Congress amended the Act.[41] The Bankruptcy Amendments and Federal Judgeship Act of 1984 (the "1984 Act") designated bankruptcy courts as "units" of the district courts.[42] Under the new system, the district courts retain original and exclusive jurisdiction in bankruptcy cases,[43] but each district court has the option of referring those cases to bankruptcy units.[44] Every district court in the United States except the District of Delaware has a standing order to refer bankruptcy cases to its bankruptcy division.[45]

The 1984 Act addressed several aspects of constitutional concern contained in the 1978 Act, but it left others untouched. For instance, the 1984 Act left in place a statute that allowed bankruptcy courts to dismiss cases without appeal to any other court,[46] thereby depriving litigants of the opportunity to be heard directly by an Article III judge. This was resolved in the case of *In re Parklane/Atlanta Joint Venture*, in which the Court of Appeals for the Eleventh Circuit ruled that this provision was unconstitutional and held that "such a dismissal must be made by an [Article III court]."[47] The court reasoned that allowing a bankruptcy

40. Tabb, *supra* note 21, at 38.

41. *Id.* at 38–39. The statute was amended again in 1990 to allow review by a district court, but not a circuit court or the United States Supreme Court. 11 U.S.C. § 305 (2000) ("An order under subsection (a) of this section dismissing a case or suspending all proceedings in a case, or a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of title 28 or by the Supreme Court of the United States under section 1254 of title 28.").

42. 28 U.S.C. § 151 (2000).

43. 28 U.S.C. § 1334(a) (2000).

44. 28 U.S.C. § 157(a) (2000).

45. The District of Delaware revoked its standing orders of reference to its bankruptcy units with regard to Chapter 11 cases. The judge for a Chapter 11 filing in Delaware is now drawn from a pool of district and bankruptcy judges. Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 927 n.639 (2000).

46. 11 U.S.C. § 305 (1988) (amended 1990) ("An order under subsection (a) of this section dismissing a case or suspending all proceedings in a case, or a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise.").

47. Parklane Hosiery Co. v. Parklane/Atlanta Venture (*In re* Parklane/Atlanta Joint Venture), 927 F.2d 532, 536 (11th Cir. 1991).

court to dismiss a case under the statute would place the jurisdiction of an Article III court within the discretion of an Article I court, thereby allowing a non-Article III court to effectively exercise judicial power.[48]

In re Parklane was a significant case in part because it set the limit for the extent to which a district court could delegate its power. The 1984 amendments placed original jurisdiction over bankruptcy disputes with the district courts and established bankruptcy courts as units of the district courts.[49] The 1984 amendments allowed the district courts to delegate a certain amount of their responsibility to the bankruptcy courts, but the district courts could not be relieved of their obligation to supervise the bankruptcy courts.[50] It is well established that "[w]hen a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction."[51] Ultimately, litigants must be able to have their cases reviewed by a district court in order for the courts to satisfy the obligation to exercise the jurisdiction granted them by Congress, as well as to ensure that judicial power is exercised by an Article III court.

In re Parklane also clarified the relative unimportance of the public versus private rights distinction to the jurisdictional issues. The United States Supreme Court has generally held that when the legislative branch creates a public right,[52] it may assign the adjudication of that right to an administrative agency or Article I court.[53] For traditionally private rights (such as the contract dispute at issue in *Northern Pipeline Construction Co.*), however, the parties have the right to present their case before an Article

48. *Id.* at 538.

49. *Id.* at 535.

50. *Id.* at 535, 538.

51. England v. La. State Bd. of Med. Exam'rs, 475 U.S. 411, 415 (1964) (quoting Wilcox v. Consol. Gas Co., 212 U.S. 19, 40 (1909)).

52. The legislative branch creates a public right when, acting pursuant to its Article I powers, it creates "a seemingly private right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." Granfinanciera v. Nordberg, 492 U.S. 33, 54 (1989).

53. *Id.* at 51; *see also* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 583 (1985) ("Congress is not barred from acting pursuant to its powers under Article I to vest decisionmaking authority in tribunals that lack the attributes of Article III courts.").

III court.[54] In *Northern Pipeline Construction Co.*, Justice Brennan, writing for the plurality, left open the question of whether even a dispute involving public rights might require review by an Article III court.[55] The court in *In re Parklane* emphasized that the restructuring of debtor/creditor relations had never been held to be a public right, and that a majority of the United States Supreme Court had never endorsed a bright-line public-versus-private-rights test to determine whether review by an Article III tribunal was necessary.[56] The Court basically dismissed the distinction as unimportant to the issue of whether the restructuring of debtor/creditor rights must be subject to review by an Article III court, deciding the case on the grounds that allowing a bankruptcy court to dismiss a case without review by an Article III court would allow a bankruptcy court to exercise judicial power.[57]

B. The Bankruptcy Process

Disputes involving private rights often make their way into bankruptcy court via 28 U.S.C. § 157 (b)(2)(B), which allows bankruptcy judges to determine the dollar amount of pending claims against the debtor.[58] The automatic stay is a tool that essentially freezes the debtor's estate, giving the bankruptcy judge a chance to decide the rights of all interested parties. The following background will explain the aspects of the bankruptcy process which are necessary to grasp the procedural problem and this paper's proposed solution.

After a debtor files a bankruptcy petition, the bankruptcy court consolidates the debtor's property into a bankruptcy estate and an automatic stay takes effect.[59] The automatic

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54. Alec P. Ostrow, *Constitutionality of Core Jurisdiction*, 68 AM. BANKR. L.J. 91, 95 (1994).

55. *See id.*

56. Parklane Hosiery Co. v. Parklane/Atlanta Venture (*In re* Parklane/Atlanta Joint Venture), 927 F.2d 532, 537 (11th Cir. 1991).

57. *Id.* at 538.

58. For example, damages for breach of contract in a pending lawsuit.

59. The automatic stay broadly prohibits attempts to encumber or seize the assets of the bankruptcy estate. *See* 11 U.S.C § 362(a) (2000). Preserving the assets of the estate is frequently necessary to allow the debtor to continue running a profitable business in the case of a reorganization, and to ensure fair distribution of assets in the case of total liquidation. Kathryn R. Heidt, *The Automatic Stay in Environmental Bankruptcies*, 67 AM. BANKR. L.J. 69, 74 (1993).

stay is a legal mandate that brings all attempts to collect debts from the debtor, and all civil litigation adjudicating the rights of the debtor, to a halt.[60] Ongoing civil lawsuits are converted to claims against the bankruptcy estate, and these claims are subject to discharge along with the claims of any other creditor.[61]

The secured creditors[62] of a debtor in bankruptcy have a number of ways to look after their interests. First, the creditors can request relief from the automatic stay, thereby enabling them to continue collection attempts or to seize collateral.[63] A bankruptcy judge may grant such relief from the automatic stay if the debtor has no equity in the collateral, and a successful reorganization of the debtor's financial affairs does not require the collateral item.[64] A second alternative involves the creditors seeking "adequate protection."[65] The purpose of adequate protection is to protect creditors from any decrease in the value of collateral resulting from, among other things, the automatic stay.[66] The judge may grant this relief in a variety of forms if the secured party's interests in the collateral are not adequately protected.[67]

In a financial reorganization, a number of transactions will normally take place, and some of these cannot be undone.[68] This makes it necessary for creditors to prevent the transactions from occurring in the first place. Once the bankruptcy court confirms a reorganization plan, the

60. A petition filed operates as a stay of "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(6) (2000).

61. 11 U.S.C. § 1141(d)(1) (2000).

62. A secured creditor is a creditor who in exchange for a loan or other consideration, or subsequent to a successful lawsuit against the debtor, has taken a security interest in a debtor's property. Mark G. Ledwin, *The Treatment of Retrospectively Rated Insurance Policies in Bankruptcy*, 16 EMORY BANKR. DEV. J. 11, 16 (1999).

63. 11 U.S.C. § 362(d) (2000).

64. *Id.* § 362(d)(2).

65. 11 U.S.C. § 363(e) (2000).

66. Evan D. Flaschen & Michael J. Reilly, *Bankruptcy Analysis of a Financially-Troubled Electric Utility*, 59 AM. BANKR. L.J. 135, 151–52 (1985).

67. For example, the judge can require the bankruptcy trustee to make cash payments to the creditor, or grant an additional lien on other collateral in the bankruptcy estate. 11 U.S.C. § 361 (2000).

68. For example, the sale of the creditor's collateral. *See supra* note 61 and accompanying text.

creditors can seek a stay of the plan's implementation pending appeal.[69] The stay must ordinarily be requested at the bankruptcy court level first, but appellants may file a motion for stay at the district court level if the motion states the reason that relief was not obtained from the bankruptcy court.[70] If a stay is sought at the district court level, the court may condition relief on the posting of a bond or other appropriate security.[71] If granted, the stay prevents the actions subject to the stay from being taken pursuant to the plan until after the district court makes a final ruling on the appeal.[72]

C. *The Doctrine of Equitable Mootness*

The concept of equitable mootness is distinct from the concept of constitutional mootness. Constitutional mootness deals with the requirement that the judiciary only rule on live cases and controversies.[73] An appeal is constitutionally moot when events have taken place, pending appeal, that make it impossible to grant any meaningful relief.[74] An appeal is equitably moot when granting relief is possible, but inequitable.[75] This concept reflects an unwillingness to alter the outcome, rather than an inability to do so.[76]

Determinations made by the bankruptcy court are normally reviewed on appeal by a district court,[77] preserving litigants' right to have disputes involving private rights heard by an Article III judge. This is not always the case, however. When a district court determines that relief from the decision of a bankruptcy court may be legally warranted, but principles of equity bar such relief, the court will dismiss the appeal and deny relief because the claim is held to be

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69. FED. R. BANKR. P. 8005.

70. *Id.*

71. *Id.*

72. "[T]he bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest." *Id.*

73. Defunis v. Odegaard, 416 U.S. 312, 316 (1974).

74. *In re* Cont'l Airlines, 91 F.3d 553, 558 (3d Cir. 1996) (citing Church of Scientology v. United States, 506 U.S. 9, 12 (1992)).

75. *Id.* at 558–59.

76. *Id.* at 559.

77. 28 U.S.C. § 158(a) (2000).

"equitably moot."[78] When a district court does this, it does not actually reach the merits of the underlying objection to the Article I judge's actions.[79] This typically arises in cases where the bankruptcy judge orders implementation of a reorganization plan or sale of assets pending appeal.[80] In this situation, the appellant has generally failed to request, or has requested and been denied, a stay of implementation.[81] Once the reorganization plan has been implemented, the debtor, creditors, and/or third parties have usually taken action in reliance on the plan.[82] On this basis, the district court determines that it would be inequitable to disrupt the plan, and therefore declines to consider the merits of the claim.[83]

The doctrine of equitable mootness has been widely recognized and applied in bankruptcy proceedings.[84] The Court of Appeals for the Second Circuit announced a five-part test to determine whether an appeal is equitably moot in the case of *In re Chateaugay Corp.*[85] The court stated:

> [S]ubstantial consummation of a bankruptcy plan will not moot an appeal if all of the following circumstances exist: (a) the court can still order some effective relief; (b) such relief will not affect the re-emergence of the debtor as a revitalized corporate entity; (c) such relief will not unravel intricate transactions so as to knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the bankruptcy court; (d) the parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings; and (e) the appellant pursued with diligence all available remedies to obtain a stay of execution of the objectionable order if the failure to do so

78. *In re Cont'l Airlines*, 91 F.3d at 558–59.

79. Manges v. Seattle First Nat'l Bank (*In re* Manges), 29 F.3d 1034, 1039 (5th Cir. 1994).

80. *See, e.g.*, *In re* Sax, 796 F.2d 994, 997–99 (7th Cir. 1986).

81. If the appellant is granted a stay pending appeal, equitable mootness will be inapplicable because a stay prevents the plan from being implemented.

82. *See In re Sax*, 796 F.2d at 998.

83. *E.g.*, Official Comm. of Unsecured Creditors of LTV Aerospace & Def. Co. v. Official Comm. of Unsecured Creditors of LTV Steel Co. (*In re* Chateaugay Corp.), 988 F.2d 322, 325 (2d Cir. 1993).

84. *In re Cont'l Airlines*, 91 F.3d at 558–59.

85. Frito-Lay, Inc. v. LTV Steel Co. (*In re* Chateaugay Corp.), 10 F.3d 944, 952–53 (2d Cir. 1993).

> creates a situation rendering it inequitable to reverse the orders appealed from.[86]

The Court of Appeals for the Third Circuit adopted a similar five-part test.[87] In the Third Circuit, equitable mootness depends on:

> (1) whether the reorganization plan has been substantially consummated, (2) whether a stay has been obtained, (3) whether the relief requested would affect the rights of the parties not before the court, (4) whether the relief requested would affect the success of the plan, and (5) the public policy of affording finality to bankruptcy judgments.[88]

The Eleventh Circuit, on the other hand, takes a more holistic view and looks to the factors as providing a "backdrop to evaluate the ultimate issue of whether a confirmation plan has progressed to the point where effective judicial relief is no longer a viable option."[89] These factors are given varying degrees of importance depending on the circumstances, but a court's chief consideration is whether the reorganization plan has been substantially consummated.[90]

III. THE PROBLEM WITH EQUITABLE MOOTNESS

Article III of the U.S. Constitution serves two purposes. The first of those purposes upholds the structural nature of our government. Article III establishes an independent judiciary, separate and distinct from the other two branches of government, thus severing the total unity of governance that had existed under colonial rule.[91] The second purpose is more personal in nature, and ensures the right of litigants to "have claims decided before judges who are free from

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86. *Id.* (citations omitted).

87. Nordhoff Invs., Inc. v. Zenith Elecs. Corp., 258 F.3d 180, 185 (3d Cir. 2001).

88. *Id.*

89. First Union Real Estate Equity & Mortgage Invs. v. Club Assocs. (*In re* Club Assocs.), 956 F.2d 1065, 1069 n.11 (11th Cir. 1992).

90. *Nordhoff Invs., Inc.*, 258 F.3d at 185 (quoting *In re* PWS Holding Corp., 228 F.3d 224, 236 (3d Cir. 2000)).

91. Article III "serves . . . to protect 'the role of the independent judiciary within the constitutional scheme of tripartite government." Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986) (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 583 (1985)).

potential domination by other branches of government."[92]

This comment is concerned primarily with the latter purpose of safeguarding litigants' right to have their claims heard by an independent judiciary. Article III guarantees independence of its judicial appointments by virtue of life tenure and a constitutional assurance that a judge will retain a set salary throughout his term.[93] In contrast to these strongholds of independence afforded to Article III judges, bankruptcy judges are appointed for fourteen-year terms,[94] with a salary that is set by statute and lacks a similar constitutional guarantee of a fixed salary.[95]

Judge Alito's dissent, described below,[96] illustrates the potential problems with the equitable mootness doctrine. The doctrine allows district courts to avoid their obligation to exercise the jurisdiction granted them by Congress and supervise the bankruptcy courts. The doctrine further allows rulings by bankruptcy courts to escape Article III review, largely due to the actions of the bankruptcy judge.[97] Therefore, equitable mootness, in at least some circumstances, effectively places the determination as to whether there will be review by an Article III court within the discretion of an Article I court. This raises the question of whether equitable mootness vests the essential attributes of judicial power in an Article I court, making the doctrine unconstitutional.[98]

The problems with equitable mootness are similar to, but perhaps more limited than, the jurisdictional problems with the Bankruptcy Reform Act of 1978. The 1978 Act threatened both the role of the independent judiciary and the litigant's right to have claims decided before "judges who are free from potential domination by other branches of government."[99] If bankruptcy courts had the power to prevent the district courts from reviewing cases, that would threaten the

92. United States v. Will, 449 U.S. 200, 218 (1980).

93. U.S. CONST. art. III, § 1, cl. 2.

94. 28 U.S.C. § 152(b) (2000).

95. 28 U.S.C. § 153(a) (2000).

96. *See* discussion *infra* Part IV.A.1.

97. *See* discussion *infra* Part IV.C.

98. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982).

99. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986) (quoting United States v. Will, 449 U.S. 200, 218 (1980)).

separation of powers safeguard. Equitable mootness arguably threatens only the litigant's right to Article III review, because Article III courts technically retain the power to review decisions by the bankruptcy courts;[100] they simply choose not to exercise it.

IV. THE DOCTRINE AS APPLIED AND RESULTING HARM

While most circuit courts claim that the appellant's failure to request a stay at the bankruptcy court level does not automatically render the appeal moot, failure to obtain a stay is practically decisive of the equitable mootness issue in some circuits.[101] The bankruptcy code does not require parties to seek a stay pending appeal, except in the case of the sale or lease of property in the bankruptcy estate by the trustee to a good-faith purchaser or lessee (such transactions are valid and irreversible, making it difficult if not impossible to grant effective relief).[102] But most courts, despite the few situations in which a stay is required, have adopted the policy that "[t]he party who appeals without seeking to avail himself of that protection does so at his own risk."[103]

The Ninth Circuit Court of Appeals took this view in the case of *In re Roberts Farms, Inc.*[104] The appellants in *In re Roberts Farms, Inc.,* requested a writ of mandamus and stay from implementation from the district court immediately following the bankruptcy court's judgment.[105] When the district court denied both requests, the appellants filed an

100. 28 U.S.C. § 158(a) (2000) ("The district courts of the United States shall have jurisdiction to hear appeals (1) from final judgments, orders and decrees; and, . . . of bankruptcy judges . . . .").

101. "A stay not sought, and a stay sought and denied, lead equally to the implementation of the plan of reorganization." *In re* UNR Indus., Inc., 20 F.3d 766, 770 (7th Cir. 1994).

102. 11 U.S.C. § 363(m) (2000).

103. Official Comm. of Unsecured Creditors of LTV Aerospace & Def. Co. v. Official Comm. of Unsecured Creditors of LTV Steel Co. (*In re* Chateaugay Corp.), 988 F.2d 322, 326 (2d Cir. 1993); *see also* Unofficial Comm. of Co-defendants v. Eagle-Picher Indus. (*In re* Eagle Pritcher Indus., Inc.), No. 96-4309, 1998 U.S. App. Lexis 31946, at *16 (6th Cir. Dec. 21, 1998) ("[A] party that elects not to pursue a stay bears the risk that a speedy implementation of a confirmation order will moot their appeal.").

104. Trone v. Roberts Farms, Inc. (*In re* Roberts Farms, Inc.), 652 F.2d 793 (9th Cir. 1981).

105. *Id.* at 795.

ordinary appeal of the judgment.[106] The Ninth Circuit found that the appeal was equitably moot because the appellants did not seek a stay from the bankruptcy court.[107] The court stated that "the practical necessities involved in a successful reorganization require that unless an order of the bankruptcy judge or the district judge is stayed pending appeal, the trustee's acts in accordance with that order should not thereafter be subject to reversal, even if the order is subsequently overturned on appeal."[108] The court acknowledged that its decision placed "a heavy burden" on bankruptcy appellants.[109]

The equitable mootness doctrine is also applied, however, even where the appellant unsuccessfully attempts to obtain a stay. The *In re Public Service Co.* case[110] suggests that a high level of persistence is required to preserve the right to have the merits heard on appeal. In the case of *In re Public Service Co.*, the shareholders of the debtor company objected to a reorganization plan on the basis that it violated Bankruptcy Code § 1129.[111] Bankruptcy Code § 1129 requires that creditors receive at least as much under the reorganization plan as they would if the debtor were liquidated in a Chapter Seven bankruptcy.[112] The shareholders filed a motion to stay implementation of the plan in bankruptcy court, which was denied.[113] The shareholders did not appeal the denial, but instead appealed the order confirming the reorganization plan and requested a stay from the district court (which was rejected).[114] The appeal was ultimately declared equitably moot, and the First Circuit Court of Appeals ruled that the

106. *Id.*

107. The fact that the appellants sought a stay from the district court in this case was inapposite, because former Bankruptcy Rule 805 required motions for stay to be directed first to the bankruptcy judge. Although the current bankruptcy rule governing stays pending appeal (Rule 8005) does not contain similar language, analogous requirements exist in other bankruptcy statutes. *In re* Cont'l Airlines, 91 F.3d 553, 569 n.5 (1996) (Alito, J., dissenting).

108. *In re Roberts Farms Inc.*, 652 F.2d at 797 (quoting Bennett v. Gemmill (*In re* Combined Metals Reduction Co.), 557 F.2d 179, 189 (9th Cir. 1977)).

109. *Id.* at 798.

110. Rochman v. Ne. Utils. Serv. Group (*In re* Pub. Serv. Co.), 963 F.2d 469 (1st Cir. 1992).

111. *In re Pub. Serv. Co.*, 963 F.2d at 470–71.

112. 11 U.S.C. § 1129(a) (2000).

113. *In re Pub. Serv. Co.*, 963 F.2d at 470–71.

114. *Id.* at 471.

appellants' failure to appeal the bankruptcy judge's denial of their motion for stay allowed the reorganization to "to proceed to a point well beyond any practicable appellate annulment."[115] A Fifth Circuit case also suggests that a high level of persistence in obtaining a stay is required.

In the case of *In re U.S. Brass Corp.*, the appellants requested a stay from the bankruptcy court the same day the order confirming the reorganization plan went into effect.[116] The bankruptcy court held a hearing on the stay motion several months later, but never ruled on the motion, and the district court affirmed the bankruptcy court's confirmation of the reorganization plan.[117] Shortly thereafter, the appellants filed an appeal with the Fifth Circuit Court of Appeals, and filed motions for stay and expedited review with the district court.[118] Several months after requesting a stay from the district court (which was never ruled upon), the appellants requested a stay from the Fifth Circuit Court of Appeals.[119] The bankruptcy and district courts' failure to rule on the stay motions left the parties without a decision to appeal—an obvious problem. At the court of appeals, the appellees argued that the appellants had not been diligent in their efforts to obtain a stay.[120] The court sidestepped the issue of diligence, merely stating that the failure or inability to obtain a stay carries the risk that review might be precluded on mootness grounds, and it is undisputed that the appellants failed to obtain a stay.[121]

A. In re Continental Airlines

Problems with the doctrine of equitable mootness are evidenced by an important Third Circuit case. An appeal to the district court in the case of *In re Continental Airlines* was dismissed for equitable mootness without review on the merits.[122] A three-judge panel in the Third Circuit initially

115. *Id.* at 473.
116. Ins. Subrogation Claimants v. U.S. Brass Corp. (*In re* U.S. Brass Corp.), 169 F.3d 957, 959 (5th Cir. 1999).
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 959–60.
121. *Id.* at 960.
122. *In re* Cont'l Airlines, 91 F.3d 553, 557 (3d Cir. 1996).

affirmed the district court's dismissal by a vote of two to one.[123] On rehearing en banc, the district court's dismissal was again affirmed by a close vote of seven to six.[124]

The appellants in *In re Continental Airlines* were four separate banks serving as trustees for certificate holders who had provided Continental with operating capital.[125] The certificates were secured by a pool of commercial aircraft and engines, which Continental continued to use throughout the bankruptcy proceedings.[126] Alleging that the collateral had declined in market value, the trustees filed motions for adequate protection, relief from the automatic stay,[127] renewed motion for adequate protection, and a bond posted by Continental to cover the decline in value.[128]

Continental's efforts to reorganize continued while the trustees awaited a ruling on their motions.[129] During that time, Continental entered into an investment agreement whereby the investors would provide $450 million, subject to certain conditions.[130] One of the conditions was a limitation of the amount and nature of liabilities and administrative claims to be assumed by the newly reorganized Continental.[131] At the confirmation hearing, Continental's expert witness testified that the investors would be permitted to walk away from the deal if the newly reorganized Continental were to remain liable for the trustees' claim.[132] Continental urged the bankruptcy judge to incorporate the adjudication of the trustees' claim into the confirmation order, thereby giving the investors an order to rely upon.[133] The trustees argued against incorporation, contending that the amount of the claim was a separate matter that could be adjudicated after confirmation of the plan.[134]

The bankruptcy court denied the trustees' motions and

123. *Id.*
124. *See id.* at 567.
125. *Id.* at 555.
126. *Id.*
127. *Id. See* discussion *supra* Part II.B for more information on the function of an automatic stay in bankruptcy proceedings.
128. *In re Cont'l Airlines*, 91 F.3d at 556.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 563.
133. *Id.*
134. *In re* Cont'l Airlines, 91 F.3d 553, 557 (3d Cir. 1996).

confirmed Continental's reorganization plan in one action.[135] The court denied the first motion for adequate protection for failure to request relief from the automatic stay first.[136] The court denied the renewed motion for adequate protection because the court found that the collateral had not declined in value since the relevant date—the day the motion for relief from automatic stay was filed.[137]

The trustees requested a stay pending appeal, which was heard in the district court due to the unavailability of the bankruptcy judge.[138] The district court opined that the trustees were likely to prevail on appeal, but denied the stay because the trustees were unable to post a satisfactory bond.[139] The trustees did not appeal denial of the stay, and Continental's investors closed the transaction by making the promised investment.[140]

The trustees appealed the bankruptcy court's orders: (1) denying the trustees' renewed motion for adequate protection, (2) confirming Continental's reorganization plan, and (3) denying the trustees' motion to establish a cash deposit.[141] The court found that the investors relied on the unstayed plan and was convinced that substantial consummation of the plan prevented the court from providing effective relief.[142] At the time the district court considered the appeal, all elements of the reorganization plan, save distributions to unsecured creditors, had been completed.[143] The district court dismissed the trustees' appeal as equitably moot without reaching the merits.[144]

The Third Circuit Court of Appeals described the questions raised by the bankruptcy court's holding as "interesting and challenging," but would address those

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135. *Id.*

136. *Id.* at 557.

137. *Id.*

138. *Id.*

139. There was apparently a dispute as to the required amount of the bond. The trustees contended that the district court required a $450 million bond, while the district court believed the trustees were unwilling to post a bond in any amount. *Id.* at 562.

140. *In re* Cont'l Airlines, 91 F.3d 553, 557 (3d Cir. 1996).

141. *Id.* at 555.

142. Nationsbank of Tenn. v. Cont'l Airlines, Inc. (*In re* Cont'l Airlines, Inc.), No. 93-195-JJF, 1993 U.S. Dist. LEXIS 18535, at *4–5 (D. Del. Dec. 30, 1993).

143. *Id.* at *5.

144. *Id.* at *7.

questions only if satisfied that the district court erred in finding the trustees' appeal equitably moot.[145] The appellate court held that equitable mootness involved a discretionary weighing of equitable and prudential factors, and therefore opted to review the district court's ruling for abuse of discretion.[146] Under this less than rigorous standard, the court affirmed the dismissal, noting the district court's finding that the investors had relied on the bankruptcy court's unstayed Confirmation Order and that there was an integral nexus between the investment and the success of the Plan.[147]

1. Dissenting Opinion

Supreme Court Justice Samuel Alito, then a member of the Third Circuit Court of Appeals, wrote an extensive dissent, joined by five other members of the court.[148] He described equitable mootness as "permitting federal district courts and courts of appeals to refuse to entertain the merits of live bankruptcy appeals over which they indisputably possess statutory jurisdiction and in which they can plainly provide relief."[149] Judge Alito argued that the majority interpreted the doctrine of equitable mootness much too broadly, depriving the trustees of their right to review by an Article III court, a right that was "particularly compelling" under the circumstances of this case.[150]

Noting several problems created by the holding, the dissent argued that the dangers of adopting a broad interpretation of equitable mootness are evidenced by this case.[151] The most obvious danger in dismissing an appeal without reaching the merits is denying relief to appellants who are legally entitled to a judgment in their favor. In this case, the majority described the merits of the trustees' claim as interesting and challenging, and the district court said that the trustees probably would have won had the merits of

145. *In re Cont'l Airlines*, 91 F.3d at 557.
146. *Id.* at 560.
147. *Id.* at 564.
148. *Id.* at 567 (Alito, J., dissenting).
149. *Id.*
150. *Id.* at 567–68.
151. *In re* Cont'l Airlines, 91 F.3d 553, 567 (3d Cir. 1996) (Alito, J., dissenting).

their appeal been reached.[152] This suggests that the trustees may have been denied relief that they were legally entitled to.

The dissent also took issue with the standard of review adopted by the majority. The dissent cited several prior Third Circuit opinions stating that review of a district court's order in bankruptcy cases is plenary because the district court sits as an appellate court in bankruptcy appeals.[153] Apart from precedential authority, the dissent reasoned that plenary review is appropriate in equitable mootness cases because an appellate court is in just as good of a position to decide the issue as the district court. It is certainly debatable whether the district court's dismissal would have been affirmed under a more exacting standard of review than abuse of discretion.

The dissent and the majority reached different conclusions about the court's ability to fashion effective relief—an issue lying at the heart of the dispute underlying equitable mootness. The majority, reviewing the district court's ruling for abuse of discretion, accepted the district court's contention that reversing the confirmation order would likely throw Continental back into bankruptcy.[154] The trustees asserted that they could pay the claim out of the amount allowed for administrative claims; an option limited, but not eliminated, by Continental's agreement with its investors.[155] The majority responded that the bankruptcy court ruled the trustees had no claim for decline in the collateral's value. The trustees therefore did not have an allowed claim, and consequently Continental did not have to pay them.[156]

This is somewhat circular reasoning, because if the appeal were allowed, then the trustees might have a claim for payment out of the allowed amount. The dissent insisted that some lesser form of relief could be fashioned without upsetting the reorganization, and that the reliance interests should weigh against the amount of the relief, rather than a threshold question of mootness.[157] If the trustees had won on

152. *Id.* at 568.
153. *Id.* at 568, n.4.
154. *Id.* at 561.
155. *Id.* at 565.
156. *Id.* at 565–66.
157. *In re* Cont'l Airlines, 91 F.3d 553, 571 (3d Cir. 1996) (Alito, J.,

the merits, then the court might have taken the reliance interests into account in deciding a remedy.[158]

The final point of dispute between the majority and dissent related to reliance. The dissent expressed skepticism over the investors' reliance interest, since they likely considered the risks of the trustees' pending appeal when deciding whether or not to lend to Continental.[159] The majority addressed this point by making the reliance test not whether the investors actually relied on confirmation of the plan, but whether as a policy matter a court ought to encourage reliance on a confirmed reorganization plan.[160] In adopting a policy that encourages reliance, the majority implicitly decided that certainty in bankruptcy reorganizations is more compelling than a litigant's right to review on the merits before an Article III court.

The doctrine of equitable mootness deprives litigants of the constitutionally granted right to have claims heard by an independent judiciary. The doctrine began with a narrow application, but appellate courts have since expanded it beyond what is constitutionally permissible.[161] The factors that courts use to decide issues of equitable mootness are effectively within the control of the bankruptcy judge. This allows the bankruptcy judge to control the outcome of an equitable mootness analysis, and therefore the district court's decision on whether to consider an appeal.[162] Even the diligent appellant has little control over the presence of equitable mootness factors. Parties with a high likelihood of success on the merits of their appeal, like the trustees in *In re Continental Airlines*, are most harmed by the doctrine, but any litigant with a non-frivolous appeal also suffers material harm.[163]

B. The Legitimacy of Equitable Mootness

The doctrine of equitable mootness arguably evolved from

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dissenting).

158. *Id.*

159. *Id.* at 572.

160. *Id.* at 565.

161. *See* discussion *infra* Part IV.B.

162. *See* discussion *infra* Part IV.C.

163. *See* discussion *infra* Part IV.D.

the holding in *In re Roberts Farms, Inc.*[164] Although the opinion is somewhat opaque,[165] it appears that the court in *In re Roberts Farms, Inc.* dismissed the appeal for failure to obtain a stay on two separate grounds. First, the appellants were required by Bankruptcy Rule 805[166] to obtain a stay pending appeal.[167] Rather than creating a new burden on appellants, Rule 805 "declared existing law," which required an appeal to be dismissed when it was impossible to grant relief.[168] Second, the appellants failed to diligently pursue a stay, thereby causing the events that would later make it inequitable for the court to consider the appeal.[169]

The *In re Roberts Farms, Inc.* court relied on Rule 805 and a Supreme Court ruling in determining that a stay was required.[170] In *Mills v. Green*, the Supreme Court ruled that an appeal should be dismissed when events occur pending appeal that render it "impossible . . . to grant [the appellant] any effectual relief."[171] Rule 805 required a stay to be obtained to prevent certain irreversible transactions from occurring, thereby rendering it impossible to grant relief.[172] The *Mills* case and Rule 805 concern constitutional mootness, rather than equitable mootness.[173] In quoting *Mills* and Rule 805, the court in *In re Roberts Farms, Inc.* suggested that the appellant's failure to obtain a stay rendered the appeal constitutionally moot, because a large number of irreversible transactions had taken place, making it impossible for the court to grant any effective relief.[174] A basic requirement of constitutional standing is that the court must be capable of at least partially addressing or remedying the injury suffered by a complainant or appellant.[175] Litigants alleging non-

164. *In re* Cont'l Airlines, 91 F.3d 553, 569 (3d Cir. 1996) (Alito, J., dissenting).

165. *See id.*

166. Bankruptcy Rule 805 has since been re-codified into several different statutes. *Id.*

167. Trone v. Roberts Farms, Inc. (*In re* Roberts Farms, Inc.), 652 F.2d 793, 795 (9th Cir. 1981).

168. *Id.* at 796.

169. *Id.* at 798.

170. *Id.* at 797.

171. Mills v. Green, 159 U.S. 651, 653 (1895).

172. *In re Roberts Farms, Inc.*, 652 F.2d at 796.

173. *See* discussion *supra* Part II.B.

174. *See In re Roberts Farms, Inc.*, 652 F.2d at 798.

175. Cynthia L. Fountaine, *Article III and the Adequate and Independent*

redressable injuries do not have constitutional standing before Article III courts.[176]

Dismissal for equitable mootness was "an entirely separate and independent ground for dismissal."[177] The *In re Roberts Farms, Inc.* court held that a party who fails to diligently pursue available remedies waives an appeal. As a result, the party "permits such a comprehensive change of circumstances to occur as to render it inequitable for this court to consider the merits of the appeal."[178] The court stated the "thrust" of the opinion is that an appellant has an obligation in some situations to diligently pursue all available remedies to stay an objectionable order.[179] Rather than suggesting constitutional mootness, this statement reflects the equitable principle that an appellant who sleeps on his rights may be denied relief as a consequence of doing so.[180] This principle has been well established in the law for centuries.

The rule announced by the *In re Roberts Farms, Inc.* court suggests a narrower interpretation of equitable mootness than the interpretation adopted by the Third Circuit.[181] The wording of the *In re Roberts Farms, Inc.* opinion implies that an appeal will not be mooted if the appellant pursues available remedies with diligence.[182] This is contrary to the effective rule adopted by the other circuits, which considers the act of obtaining a stay to be necessary, but not sufficient, to prevent a dismissal for equitable mootness.[183] Because most circuits have instituted a de facto requirement that appellants obtain a stay pending appeal,[184] the appellate courts have extended the doctrine significantly

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State Grounds Doctrine, 48 AM. U. L. REV. 1053, 1080 (1999).

176. *See id.*

177. *In re Roberts Farms, Inc.*, 652 F.2d at 797.

178. *Id.* at 798.

179. *Id.*

180. *E.g.*, James S. Sable, *A Chapter 13 Debtor's Right to Cure Default Under Section 1322(b): A Problem of Interpretation*, 57 AM. BANKR. L.J. 127, 138 n.72 (1983).

181. *See In re* Cont'l Airlines, 91 F.3d 553, 570 (3d Cir. 1996).

182. By arguing that lack of diligence in pursuing remedies causes equitable mootness, the court implicitly says that diligently pursuing remedies would have saved the appeal from equitable mootness. *In re Roberts Farms, Inc.*, 652 F.2d at 798.

183. *See* discussion *supra* Parts III–IV.

184. *See* discussion *supra* Parts III–IV.

since the *In re Roberts Farms, Inc.* case. In summary, the *In re Roberts Farms, Inc.* court has adopted a viewpoint that recognizes the equitable mootness doctrine as legitimate, but limits its application so as to reduce the risk of unfairness to an appealing party.[185]

C. *Factors Within the Control of the Bankruptcy Court*

Most circuits have adopted an equitable mootness analysis that is very similar to the Third Circuit's five-factor test.[186] Courts examine (1) whether a stay has been obtained, (2) whether the plan has been substantially consummated, (3) whether the relief requested would affect the rights of parties not before the court, (4) whether the relief requested would affect the success of the reorganization plan, and sometimes, (5) the public policy considerations in giving finality to bankruptcy judgments.[187] The first two factors overlap, because if a stay has been obtained it will be difficult, if not impossible, to substantially consummate the reorganization plan.

The bankruptcy judge has significant control over the first two factors, and control to a much lesser extent over the fourth factor. The appellant must ordinarily request a stay from the bankruptcy court before requesting one from the district or appellate court.[188] The bankruptcy court can deny the stay, or simply fail to rule as the bankruptcy court in the

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185. It is important to note the difference between transactions contemplated by Rule 805 (now contemplated by Bankruptcy Code sections 363(m) and 364(e)), and transactions not mentioned in the statutes. 11 U.S.C. § 363(m) (2000); 11 U.S.C. § 364(e) (2000).

The former transactions cannot be reversed, leaving courts without the power to grant effective relief. § 363(m); § 364(e). Therefore, appeals requesting reversal of the transactions are constitutionally moot. All other transactions, however, can be reversed, giving appellate courts the power to grant effective relief. Therefore, these transactions are not constitutionally moot, but they may nonetheless be equitably moot.

186. The majority in *In re Continental Airlines* purports to be adopting equitable mootness as adopted by its "sister circuits," citing cases from the Fifth, Seventh, Second, First, Eleventh, Fourth, Ninth, and D.C. Circuits. *In re* Cont'l Airlines, 91 F.3d 553, 558–59 (3d Cir. 1996).

187. *See, e.g., In re* GWI PCS 1, Inc., 230 F.3d 788, 800 (5th Cir. 2000); First Union Real Estate Equity & Mortgage Invs. v. Club Assocs. (*In re* Club Assocs.), 956 F.2d 1065, 1069 n.11 (11th Cir. 1992); Rochman v. Ne. Utils. Serv. Group, (*In re* Public Service Co.) 963 F.2d 469, 471–73 (1st Cir. 1992).

188. *See supra* note 60 and accompanying text.

In re U.S. Brass Corp. case did.[189] Because a bankruptcy judge has control over most factors of the test, the bankruptcy judge can effectively control the outcome of the test, and therefore whether an appeal is deemed equitably moot.

The timing of the bankruptcy court's ruling on the appellant's motion for stay, assuming the court rules at all, allows the bankruptcy judge to control consummation of the reorganization plan. Absent an order to stay implementation of the plan pending appeal, all parties involved are likely to begin taking actions to further the plan.[190] Each day that the bankruptcy judge delays in his ruling allows additional actions to be taken in reliance on the plan. Appeals are frequently scheduled several months after confirmation of the plan, making it very likely that an unstayed reorganization plan will be substantially consummated by the time the appeal reaches an Article III court.[191]

In contrast, the bankruptcy judge has very limited control over whether the appellant's requested relief will affect the success of the reorganization plan, though more so than the appellant at the outset. However, in deciding to affirm a fragile reorganization plan (i.e., a plan likely to fail with minimal tampering), the bankruptcy judge can limit an appellant's options for relief.[192] The judge can also make specific findings of fact that suggest disruption of the plan would affect the success of the reorganization.[193] A bankruptcy judge's ability to make specific findings of fact and affirm a fragile reorganization plan give the bankruptcy

189. *See supra* note 117 and accompanying text.

190. *See, e.g.*, Hope v. Gen. Fin. Corp. (*In re* Kahihikolo), 807 F.2d 1540, 1542 (11th Cir. 1987) (per curiam) ("[I]n the absence of a stay, action of a character which cannot be reversed by the court of appeals may be taken in reliance on the lower court's decree.").

191. *See, e.g.*, Ins. Subrogation Claimants v. U.S. Brass Corp. (*In re* U.S. Brass Corp.), 169 F.3d 957, 959 (5th Cir. 1999).

192. The appellant has more control at the district court level, because he/she can choose to request relief that will not affect the success of the reorganization. The bankruptcy judge has more control at the outset, however, because the judge limits an appellant's range of relief options by confirming a particularly fragile reorganization plan.

193. The bankruptcy court in *In re Continental Airlines* specifically found, for example, that the appellants' claim was not an allowed administrative claim, and therefore the allowed administrative claims to be paid by the newly reorganized Continental would be within the cap the investors demanded as part of the plan. *In re* Cont'l Airlines, 91 F.3d 553, 563 (3d Cir. 1996).

judge some control over the third factor, though not much.

D. The Effect of Failure to Obtain a Stay

The net effect of the precedent relating to equitable mootness is that the various circuits have, as a practical matter, conditioned a litigant's right to review by an Article III court on whether the litigant has obtained a stay.[194] Initially, courts suggested that it was a litigant's failure to request a stay that allowed the parties to develop a reliance on the reorganization plan, mooting the appeal.[195] But in cases where the appellants attempted unsuccessfully to obtain a stay, the courts have reluctantly admitted that the effect is the same, finding the appeal moot in those cases as well.[196] This is problematic because the bankruptcy court has control over whether a stay is granted or not. As discussed above, failure to obtain a stay will usually result in substantial consummation of the bankruptcy plan. A shrewd potential appellee may even rush to implement the reorganization plan, knowing that doing so will make it possible for the potential appellee to argue equitable mootness.

The five-factor equitable mootness analysis operates such that, in an unstayed reorganization, the district court nearly always finds the other factors present. When an entity reorganizes, it frequently enters into new business contracts and relationships based on the plan.[197] Presumably, only the debtor and creditor advancing the dispute typically come before the court on appeal, making it likely that granting relief would affect the rights of parties not before the court. The question of whether granting relief is likely to affect the success of reorganization can be highly speculative, and therefore grants the district court great leeway in deciding whether to hear an appeal on the merits.[198] The last possible

194. *See* discussion *supra* Part III.

195. *See, e.g.*, *supra* note 103 and accompanying text.

196. *See, e.g.*, *supra* note 110 and accompanying text.

197. *See, e.g.*, *In re Cont'l* Airlines, 91 F.3d at 566.

198. In the *In re Continental Airlines* dissent, Judge Alito stated that in order to find that effective relief could not be granted, the majority would have to show that it could not grant the appellants one dollar of relief without upsetting the bankruptcy plan. *Id.* at 571 (Alito, J., dissenting). The question of course is not whether *any* relief could be granted, but whether any *meaningful* relief could be granted, which is part of why that inquiry is highly

factor, public policy considerations in giving finality to bankruptcy judgments will, by nature, always be present.

The bankruptcy code generally does not require appellants to seek a stay pending appeal, but failure to do so may rob litigants of a constitutional right.[199] The effect of the circuit courts' decisions is that the litigant wishing to preserve an appeal must (1) request a stay, (2) request a writ of mandamus ordering the bankruptcy court to rule on the motion for a stay if it fails to do so after a short period of time, and (3) appeal from the ruling denying a stay.[200] But even taking those actions does not guarantee appellants review by an Article III court.[201] In short, while a litigant is not required to obtain a stay pending appeal in theory, in reality the litigant must do so to preserve the right to review by an Article III court.

E. Statutory Issue

In refusing to hear the merits of a case on equitable mootness grounds, the district courts are shirking their obligation under the bankruptcy statute. While the statute gives district courts the option of delegating certain responsibilities to bankruptcy courts, they have a duty to supervise the actions of those courts.[202] Doing so is particularly important in this case because the sole remedy of bankruptcy parties facing an unjust ruling is an appeal to the district court.[203] Congress vested the district courts with original and exclusive jurisdiction over bankruptcy claims.[204] In light of the district courts' virtually unflagging obligation to exercise the jurisdiction granted to them,[205] they should not

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speculative. The other part that makes the inquiry highly speculative is a judge's inherent lack of omniscience that would allow the judge to determine the impact of a particular dollar amount on the success of a bankruptcy reorganization.

199. *In re* Joshua Slocum, Ltd., 922 F.2d 1081, 1085 (3d Cir. 1990).

200. Numerous decisions criticized appellants for failing to request a stay, failing to request a writ of mandamus ordering sluggish courts to rule on the request, and failing to appeal a ruling denying the stay. *E.g.*, Trone v. Roberts Farms, Inc. (*In re* Roberts Farms, Inc.), 652 F.2d 793, 795 (9th Cir. 1981).

201. *See supra* note 183 and accompanying text.

202. *See supra* note 50 and accompanying text.

203. *See supra* note 41.

204. 28 U.S.C. § 1334(a) (2000).

205. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

be refusing to consider the merits of non-frivolous appeals from the bankruptcy courts.

F. Constitutional Issue

The Bankruptcy Reform Act of 1978 implicated both separation of powers issues and litigants' rights issues. The law involved an attempt by the legislative branch to control the exercise of Article III judicial power. With cases involving equitable mootness, however, it is the judicial branch, not the legislative branch, that chooses not to exercise Article III power. This helps to ameliorate issues involving separation of powers and constitutional structure of government, but the litigants' rights issues raised by the denial of Article III review largely remain. Both the bankruptcy courts and the district courts contribute to the problem.

Bankruptcy courts contribute to the problem by effectively exercising control over whether a litigant has the opportunity to present the merits of his or her case before the district court. The doctrine of equitable mootness as applied places a litigant's right to review by an Article III court, as a practical matter, within the discretion of an Article I bankruptcy court. The circuit courts' adoption of the five-factor analysis, which places an emphasis on obtaining a stay from the bankruptcy court, effectively allows bankruptcy court rulings to determine the outcome of an equitable mootness inquiry. Even the diligent appellant has little control over the presence of equitable mootness factors. Dismissals for equitable mootness in cases where the appellant sought a stay unsuccessfully are particularly unfair, making "equitable mootness" something of a misnomer.

District courts contribute to the problem by refusing to supervise the bankruptcy courts. Federal courts have a "virtually unflagging obligation" to exercise the jurisdiction given to them.[206] In dismissing an appeal for equitable mootness without reaching the merits, the district court is essentially abstaining from exercising its jurisdiction,[207]

206. *Id.*

207. The doctrine of abstention is only applicable by analogy, but essentially dictates that a federal court may decline to exercise jurisdiction only in exceptional circumstances.

contrary to their obligation to do so. A broad interpretation of equitable mootness enables the courts to refrain from exercising the power vested in them by statute and the U.S. Constitution. In doing so, the district courts leave review of litigants' rights in the hands of an Article I court, unconstitutionally depriving litigants of the right to have claims decided by an Article III court.

G. How a Sophisticated Party Might Work the System

In a contentious bankruptcy proceeding, a party who finds themselves in the same position as Continental Airlines has the opportunity to make things harder for its creditors. If the bankruptcy court refuses to grant a stay pending appeal, the uncooperative debtor can move quickly to implement the reorganization, relying on the plan to the greatest extent possible. If the reorganization plan prefers some creditors to others, or the plan is heavily slanted in favor of the debtor, the debtor may take any opportunity to deprive the opposing party of an appeal. This opportunity should rarely arise, but on the occasion that a bankruptcy court renders a series of unjust decisions[208] and the district court refuses to hear the appeal, an uncooperative debtor can exacerbate the problem caused by equitable mootness.

V. PROPOSAL

As it currently stands, the doctrine of equitable mootness allows litigants' claims to be ultimately decided by an Article I court, without an opportunity for review by an Article III court.[209] This problem stems both from the actions of bankruptcy courts, and the district courts' failure to supervise the bankruptcy courts, in spite of their obligation to do so. Although the public policy arguments in favor of encouraging reliance on bankruptcy rulings are substantial,[210] such arguments cannot outweigh a constitutional right. Because the doctrine of equitable mootness and the courts' interpretation as it currently stands deprives litigants of their

208. Blessing a reorganization plan that fails to protect a party's rights, failing to hear and/or decide a request for stay pending appeal in a timely fashion, refusing to grant a stay pending appeal, and likely denying other requests for relief along the way.

209. *See* discussion *supra* Part IV.C–D.

210. *In re* Cont'l Airlines, 91 F.3d 553, 555 (3d Cir. 1996).

constitutional right to have claims reviewed by an independent judiciary, some manner of reform is necessary.

The best way to remedy the problems created by equitable mootness is to craft a more effective and timely process for obtaining a stay pending appeal. The circuit courts have made clear that obtaining an order to stay implementation of a financial reorganization pending appeal is crucial to the preservation of that appeal.[211] Further, timely entry of a stay order would prevent all parties from developing reliance interests on the reorganization plan, allowing courts on appeal to grant relief without requiring them to "unscramble the eggs"[212] of a substantially consummated reorganization plan.

The enactment of two simple procedural rules within Title 11 of the U.S. Code could fix the problem. The first rule would establish an automatic stay pending appeal, which would become effective as a matter of law immediately when an appeal was filed. To reduce time delays, appellants wishing to take advantage of the automatic stay would be required to file an appeal within ten days of the bankruptcy court's confirmation of a reorganization plan. An automatic stay effective on the prompt filing of an appeal would reward appellants who diligently pursue their stay remedies, while at the same time place very little burden on other interested parties. Waiting ten days to see if an appeal is filed before implementing a reorganization plan should have a de minimis effect on the success of the plan. Waiting several months, however, may have a more sizeable effect, necessitating a second rule.

The second rule would require district courts to decide appeals from the bankruptcy court's confirmation of a reorganization plan within sixty days of filing. As bankruptcy reorganization proceedings often last several months,[213] waiting an additional sixty days to begin implementing a reorganization plan should not substantially affect the success of the reorganization. In cases where the additional sixty-day period would substantially diminish a

211. *See* discussion *supra* Part IV.D.

212. *In re Cont'l Airlines*, 91 F.3d at 566.

213. *See* Joseph F. Rice & Nancy W. Davis, *The Future of Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims*, 50 S.C. L. REV. 405, 441 (1999).

debtor's likelihood of successfully emerging as a newly reorganized entity, the appellee could request an emergency ruling from the district court on the merits of the appeal. The district court should be willing to grant such a request, assuming a speedy ruling is warranted by the circumstances.

Enactment of these two rules would provide a reasonable balancing of the interests involved. The automatic stay pending appeal would prevent substantial consummation of the reorganization plan and reliance interests from forming, ensuring that the appellant's case is not dismissed for equitable mootness. The requirement that district courts rule on the merits of an appeal from confirmation of a reorganization plan within sixty days would limit the burden on parties for whom a speedy reorganization is important. Although the automatic stay pending appeal and directive to rule on the merits within sixty days would not apply to the subsequent circuit court appeal, the constitutional problems with equitable mootness would have already been eliminated by giving appellants an opportunity to be heard on the merits at the district court level. The Constitution requires such an opportunity, and enactment of the two procedural rules discussed above would preserve litigants' right to be heard by an Article III court.

VI. CONCLUSION

The right of a litigant to have his case considered by an independent judge is an essential constitutional right and must be preserved in order to protect both the rights of litigants and the fundamental constitutional structure of American government. The Supreme Court of the United States has ruled that Article III of the U.S. Constitution requires the essential attributes of judicial power to be exercised exclusively by the judicial branch of government. The doctrine of equitable mootness, however, places review by an Article III court effectively within the discretion of an Article I court, thereby depriving litigants of their constitutional right to review by an independent judiciary.[214]

A litigant's inability to obtain a stay pending appeal fundamentally contributes to the constitutional problem. When a debtor's reorganization plan is implemented, it

214. *See* discussion *supra* Part IV.F.

results in events or transactions occurring which equitably "moot" the litigant's appeal.[215] The solution is to balance the interests of the various parties by crafting a more effective and timely process for obtaining a stay pending appeal, which would prevent such events or transactions from occurring in the first place.[216] This could be accomplished by the implementation of two simple procedural rules that place a minimal burden on all of the parties, while honoring the litigant's right to review by an Article III court.[217] The recommended rules should be adopted to give a litigant the ability to obtain a stay pending appeal independently, thereby preserving the right to review by an independent judiciary and resolving the constitutional issue created by the doctrine of equitable mootness.

215. *See* discussion *supra* Part IV.D.
216. *See* discussion *supra* Part V.
217. *See* discussion *supra* Part V.